80-1166

No. _____

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MISSOURI,
Petitioner,

v.

RANDY LEE SINCLAIR,
Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT

PETITION FOR CERTIORARI

Petitioner, State of Missouri, respectfully requests that the writ of certiorari issue to review the judgment of the Missouri Court of Appeals, Southern District.

JOHN ASHCROFT
Attorney General

PAUL ROBERT OTTO
Assistant Attorney General

Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is violated by convicting a defendant, in one proceeding, of both second degree assault, § 565.060, RSMo 1978, and armed criminal action, § 571.015, RSMo 1978, where the proof required to establish a violation of the former is necessarily required to prove a violation of the latter?

2. Whether the Missouri courts are bound by *Brintley* v. *Michigan*, ____ U.S. ____, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979), a decision of this Court dismissing an appeal (wherein the same federal constitutional issue was raised) for want of a substantial federal question?

3. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980), *rehearing en banc*, (August 18, 1980), wherein that court held that convicting respondent in a single proceeding of both first degree robbery and armed criminal action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, conflicts with this Court's decision in *Brintley* v. *Michigan*, ____ U.S. ____, 100 S.Ct. 418, 62 L.Ed.2d 317 (1979); therein this Court dismissed, for want of a substantial federal question, an appeal which sought to review the Michigan Supreme Court's decision holding that the double jeopardy clause of the Fifth Amendment to the United States Constitution was not violated by convicting a defendant in a single proceeding of both armed robbery, § 750.529, M.C.L.A., and possession of a firearm during the commission of a felony, § 750.227(b), M.C.L.A.

4. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980), *rehearing en banc*, (August 18, 1980), conflicts with this

Court's decision rendered in *Whalen* v. *United States*, ____ U.S. ____, 100 S.Ct. 1432, ____ L.Ed.2d ____ (1980)?

5. Whether the Missouri Supreme Court's most recent decision in *Sours* v. *State, supra,* is in accordance with this Court's order of May 27, 1980, vacating judgment and remanding the case to the Missouri Supreme Court for further consideration in light of *Whalen* v. *United States, supra*?

PARTIES

In the Missouri Court of Appeals, Southern District, the parties were as follows:

State of Missouri, respondent, and Randy Lee Sinclair, appellant, in cause No. 11681.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF MISSOURI,
Petitioner,

v.

RANDY LEE SINCLAIR,
Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT

PETITION FOR CERTIORARI

Petitioner, State of Missouri, respectfully requests that the writ of certiorari issue to review the judgment of the Missouri Court of Appeals, Southern District.

OPINION BELOW

The opinion in the case for which the writ of certiorari is being sought is printed in Appendix A. It has not yet been published. The case is as follows:

State of Missouri v. Randy Lee Sinclair, Missouri Court of Appeals, Southern District, No. 11681, opinion filed October 1, 1980.

JURISDICTIONAL STATEMENT

In *State of Missouri* v. *Randy Lee Sinclair,* No. 11681, the opinion in the Missouri Court of Appeals, Southern District, was filed October 1, 1980. The opinion affirmed the conviction for a second degree assault for which Sinclair was sentenced to eight years in prison. The opinion reversed the conviction for armed criminal action for which Sinclair was sentenced to thirty years in prison. The thirty year sentence had been ordered by the trial court to run before the eight year sentence. On November 12, 1980, the Supreme Court of Missouri overruled the State of Missouri's application for transfer. The order overruling the application is included in Appendix A directly after the opinion from the Missouri Court of Appeals.

The present petition is filed within sixty days after the denial of the application for transfer in this case, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sections 565.060 and 571.015, RSMo 1978, are set forth in Appendix B. Sections 750.227(b) and 750.529, M.C.L.A., are set forth in Appendix C.

STATEMENT OF THE CASE

This petition is brought as a result of the continuing controversy over the application of federal constitutional double jeopardy principles to the prosecution of criminal defendants in Missouri under the Armed Criminal Action Statute, § 571.015, RSMo 1978 (formerly § 559.225, RSMo Supp. 1976), and in the same trial, for the felony underlying the armed criminal action charge. In the case below, the Missouri Court of Appeals has issued an opinion relying on the authority of *Sours* v. *State,* 593 S.W.2d 208 (Mo. banc 1980); *vacated and remanded,* 445 U.S. ____ (1980); *decided upon rehearing,* ____ S.W.2d ____ (Mo. banc August 18, 1980); petition for writ of certiorari now pending in this court under No. 80-571. This petition is being filed so that, if the State of Missouri prevails in the case of *Sours* v. *State,* it will be able to obtain the vacation of the reversal of the armed criminal action conviction in the case which is the subject of this petition.

The facts in this case, for purposes of the double jeopardy clause, are substantially the same in that the respondent was prosecuted under the armed criminal action statute and also prosecuted for the underlying felony.

The issues in this petition will be identical to those in the petition in *State of Missouri* v. *William Scott Sours,* No. 80-571, presently pending in this court, and in the subsequently filed petitions in *State of Missouri* v. *Wallace D. Counselman, Jr.,* No. 80-754 and *State of Missouri* v. *Donald Greer,* No. _____.

THE REASONS FOR GRANTING THE WRIT

Petitioner submits that the writ of certiorari should issue because the opinion below was based entirely on the authority of the Missouri Supreme Court's holding in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980), *rehearing en banc* (August 18, 1980), which conflicts with recent decisions of this court.[1]

On May 27, 1980, this Court vacated the Missouri Supreme Court's judgment in *Sours* v. *State*, 593 S.W.2d 208 (Mo. banc 1980) (hereinafter referred to as *Sours* I), and remanded the case back for further consideration in light of *Whalen* v. *United States*, ____ U.S. ____, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The Missouri Supreme Court responded to this Court's directive by rendering an opinion in *Sours* v. *State*, No. 61458 (August 18, 1980) (hereinafter referred to as *Sours* II), wherein the Missouri Supreme Court, after determining unequivocally that the Missouri legislature clearly intended that punishment be imposed for both armed criminal action and its underlying felony, incorporated by reference its analysis on the Fifth Amendment issue made in *Sours* I. See *Sours* II, *slip opinion* at 18.

Although the Missouri Supreme Court was presented with the argument that the combined wisdom of both *Whalen* v. *United States*, *supra*, and *Brintley* v. *Michigan*, *supra*, expressed this Court's definitive determination that a defendant can be convicted in one proceeding of two crimes even where the proof required to establish a violation of the first is necessarily required to prove the second,

---

[1]The Missouri Supreme Court's most recent holding in the *Sours* case is identical to original holding made prior to this Court's granting of the State's petition for a Writ of certiorari.

if the legislature so intends, it nevertheless opined as follows:

> The United States Supreme Court has never decided whether imposing separate punishments in a single proceeding both for the offense of committing a felony by means of a dangerous and deadly weapon and for the commission of the felony violates the double jeopardy clause of the federal constitution. The Court expressly declined to rule on this issue in *Simpson* v. *United States,* [citation omitted] C.F. *Whalen* v. *United States* [citation omitted]. Each time a double jeopardy question has been before the United States Supreme Court, it has found it unnecessary to address the constitutional question, because it has been able to find that the legislature did not intend to separately punish the two offenses involved. *Whalen* v. *United States,* [citation omitted]; *Simpson* v. *United States,* [citation omitted], *Iannelli* v. *United States* [citation omitted]. See *Jeffers* v. *United States* [citation omitted]. No United States Supreme Court opinion has considered a statute that contained wording similar to, or identical to, that found in Missouri's Armed Criminal Statute.

Sours II, *slip opinion* at 2.

In discussing *Whalen* v. *United States, supra,* the Missouri Supreme Court stated:

> The Court expressly reserved the question whether, had Congress clearly imposed multiple punishments for the same offense, the imposition would violate the double jeopardy clause. Before holding that the Court would decide the question of statutory interpretation without deferring to the interpretation of the District of Columbia Court of Appeals, the Court carefully distinguished the question of statutory interpretation

> from the constitutional question. . . . Accordingly, since the Court did not reject the petitioner's statutory claim, it did not reach the constitutional issue presented. [footnote omitted]

Sours II, *slip opinion* at 3.

Before reasserting its position take in *Sours* I, the Missouri Supreme Court determined that, without question, the Missouri General Assembly intended that punishment be imposed for both armed criminal action and its underlying felony. That court went on to say that neither case law nor legislative enactment conflicted with the Missouri General Assembly's unequivocal intent, which appears on the face of the statute (See Appendix B), that punishment be imposed for both crimes. *Sours* II, *slip opinion* at 8-18. The Missouri Supreme Court concluded its legislative intent analysis with the specter of this Court quite apparent: "The unique wording of armed criminal action statute dictates that we must bite the bullet and meet the federal constitutional issue." *Sours* II, *slip opinion* 17-18 [footnote omitted].

With the "bullet" firmly between their teeth, the Missouri Supreme Court proceeded to readopt their original opinion rendered in *Sours* I, but not without, again, the specter of the United States Supreme Court reappearing:

> If the vacation of our prior judgment and the remand of the case for reconsideration in light of *Whalen,* was intended to lead this Court [sic] to adopt the view that the General Assembly is free to impose separate punishments for two crimes that constitute the same offense under the traditional same evidence test, we are unable to so read *Whalen* and we are not prepared to take that step. We believe that the

> United States Supreme Court has heretofore reserved that question as noted above. We believe that such a ruling would abolish the traditional double jeopardy protection against multiple punishments for the same offense. It would require bifurcation of the meaning of 'same offense' under the double jeopardy clause. It would grant to the state legislature the power to define meaning of 'same offense' as used in the double jeopardy clause of the Constitution, a traditional judicial function. The implicit effect of such a holding would be that the double jeopardy clause would hereafter be only a limitation on the executive and judicial branches, but not on the legislative branch of government. We do not believe that it is appropriate for this Court [sic] to make such a ruling. If such a ruling is to be made, it is the responsibility of the United States Supreme Court to make it.

Sours II, *slip opinion* at 22-23.

Petitioner requests that this Court reassert its definitive decisions on this federal constitutional issue for the benefit of the Missouri Supreme Court. It is clear that the Missouri Supreme Court has chosen to disregard recent decisions of this Court which have attempted to elucidate the law of double jeopardy herein raised. In ***Brintley*** **v.** ***Michigan, supra,*** the appellant sought to present the following question to this Court:

> Does double jeopardy clause prohibit separate convictions and sentences for violation of state statute, § 750.227(b), proscribing possession of firearm during commission of felony and for underlying felony (armed robbery in one case and second degree murder in another), where all proofs required to establish violation of underlying felony are necessarily required for proof of violation of § 750.227(b) where there is no

> evidence that weapon has been possessed for any other purpose than commission of underlying felony, where underlying felony is specifically charged as felony element of firearms possession charge, and where (in armed robber case) state has already augmented punishment for armed robberies above punishment imposed for unarmed robberies.

26 Crim.L.Rep. 4113. (§ 750.227(b), M.C.L.A. appears in Appendix D).

Petitioner submits that this Court's summary dismissal in *Brintley* v. *Michigan, supra,* was a disposition on the merits which conflicts with the Missouri Supreme Court's decisions rendered in *Sours* I and *Sours* II. Such a disposition rejects the specific challenges presented in the statement of jurisdiction and leaves, undisturbed, the original judgment appealed from. *Mandel* v. *Bradley,* 432 U.S. 173, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977); *Hicks* v. *Miranda,* 422 U.S. 332, 343-345, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975).

While summary actions by this Court should not be understood as breaking new ground, they should prevent lower courts from coming to contrary conclusions or identical issues. *Mandel* v. *Bradley, supra.* It is clear that the Missouri Supreme Court in *Sours* II has come to a conclusion contrary to that reached by this Court in *Brintley* v. *Michigan, supra.* The Michigan statute, which appears in Appendix C, is remarkably similar to the Missouri armed criminal action statute. The issue summarily dismissed, for want of a substantial federal question in *Brintley,* is precisely the same issue the Missouri Supreme Court found to be dispositive in its reversal of respondent's conviction for armed criminal action in *Sours* I and II.

This Court has manifested its disapproval of state court expansion of federal constitutional rights as evi-

denced by this Court's opinion rendered in *Oregon* v. *Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), where it was stated:

> A state is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. [citation omitted]. But, of course, a state may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.

Id., 420 U.S. at 719. See also *North Carolina* v. *Butler*, 441 U.S. 369, 99 S.Ct. 1755, 1759, 60 L.Ed.2d 286 (1979).

Petitioner submits that the Missouri Supreme Court misinterpreted this Court's decision rendered in *Whalen* v. *United States, supra.* The Missouri Supreme Court quite clearly disregarded the Court's conclusion, reached in *Whalen*, that:

> In the present case, therefore, if Congress has not authorized cumulative punishment for rape and for an unintentional killing committed in the course of the rape, contrary to what the Court of Appeals believed, the petitioner has been impermissibly sentenced. The *dispositive* question, therefore, is whether Congress did so provide.

Whalen v. *United States*, 100 S.Ct. at 1436. (Emphasis added). It appears that the Missouri Supreme Court misinterpreted the following words of this Court:

> The Fifth Amendment guarantee against double jeopardy embodies in this respect simply one aspect of the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses and to proscribe the punishments to be imposed upon those found guilty

> of them, resides *wholly* with the Congress. If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy but also the Constitutional principle of separation of powers in a manner which trenches particularly harshly on individual liberty.

Whalen v. *United States,* 100 S.Ct. 1436-1437 [Citations and footnote omitted.] [Emphasis added.]

Further evidence of the Missouri Supreme Court's failure to grasp the import of the *Whalen* decision is its inability to recognize dispositive language in the *Whalen* decision. In discussing *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) (which this Court found to be incorporated in the District of Columbia Code), the majority in *Whalen* state that:

> We think that the only correct way to read § 23-112, in light of its history and its evident purpose, is to read it as embodying the *Blockburger* rule of construing the penal provisions of the District of Columbia Code. Accordingly, where two statutory offenses are not the same under the *Blockburger* test, the sentences imposed 'shall, unless the court expressly provides otherwise, run consecutively.' [footnote omitted] And where the offenses are the same under that test, the cumulative sentences are not permitted, *unless elsewhere specifically authorized* by Congress.

Whalen v. *United States,* 100 S.Ct. at ____ [Emphasis added.] That the Missouri Supreme Court misapplied the *Blockburger* rule is further evidenced by this Court's recent opinion in *Illinois* v. *Vitale,* 27 Crim.L.Rep. 3190, wherein the test is characterized as follows:

In *Brown* v. *Ohio,* 432 U.S. 161 (1977), we stated the principal test for determining whether two offenses are the same for purposes of barring *successive* prosecutions. Quoting from *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932), which in turn relied on *Gavieres* v. *United States,* 220 U.S. 338, 342-343 (1911), we held that

> 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'

Illinois v. *Vitale, supra.*

Petitioner submits that a definitive decision by this Court, on this federal constitutional issue is necessary in this case. Diametrically opposed views exist regarding this issue in different jurisdictions, both state and federal. There appears to be conflicting views on this issue between the Missouri Supreme Court and the Eighth Circuit Court of Appeals.

The following cases from other jurisdictions have found that armed robbery and the use of a firearm in the commission of a felony are distinct offenses under the tests set forth in *Blockburger* v. *United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), because it was held that the charge of robbery contains elements not necessarily included in the felony firearms offense. *State* v. *Saxon,* 193 Neb. 278, 226 N.W.2d 765 (1975); *Kowalski* v. *Parratt,* 533 F.2d 1071 (8th Cir. 1976), *cert. denied,* 429 U.S. 844 (1976); *Wayne County Prosecutor* v. *Recorder's Court Judge,* 406 Mich. 374, 280 N.W.2d 793 (1979) (decision of the Michigan Supreme Court giving rise to

this Court's decision in *Brintley* v. *Michigan*); *Jones* v. *Commonwealth of Virginia,* 235 S.E.2d 313 (1977); *United States* v. *Hearst,* 412 F.Supp. 877 (N.D.Calif. 1976).

The Missouri Supreme Court recognized but neglected the foregoing authority and chose to follow cases from other jurisdictions which it felt supported its view that the double jeopardy clause prohibits punishing a person twice for the same offense in a single prosecution. *State* v. *Pinder,* 375 So.2d 836, 838 (Fla. 1979); *Tyson* v. *State,* 386 N.E.2d 1185, 1193 (Ind. 1979); *State* v. *Frye,* 283 Md. 709, 393 A.2d 1372, 1375 (1978); *Briggs* v. *State,* 573 S.W.2d 157, 159 (Tenn. 1978).

The dire need for a decision of this Court in regard to this federal constitutional issue is exemplified by recent decisions of certain state supreme courts which conflict in their interpretation of the federal double jeopardy clause. In *Whack* v. *State,* 416 A.2d 265 (Md. 1980), the Court of Appeals of Maryland (highest state court) held that imposition of punishment for both robbery with a dangerous or deadly weapon and the separate crime of use of a handgun in the commission of a felony does not violate the Fifth Amendment prohibition against double jeopardy. Conversely, the Supreme Court of Delaware, in *Hunter* v. *Delaware,* No. 215 (March 15, 1980), held that the double jeopardy clause prevented imposing punishment for both assault in the first degree and the separate crime of possession of a deadly weapon during the commission of a felony.

An immediate decision on this federal constitutional issue is necessary; even the Missouri Supreme Court so stated in *Sours* II: "Following the original *Sours* opinion our prosecutors and penal authorities indicated informally to this Court [sic] that they believed that as many as four-hundred to six-hundred prior convictions might be affected by the opinion." *Sours* II, *slip opinion* at 12.

Every jurisdiction in this country is anxiously awaiting a definitive decision by this Court in this case because the facts and federal constitutional issue here present an excellent opportunity for this Court's review; this is especially true since the legislative intent issue has been determined and no further state grounds remain in the case. Finally, a decision is necessary because there exist decisions of this Court conflicting with the Missouri Supreme Court's decision in *Sours* II. Therefore, it is respectfully requested that this Court issue the writs and resolve the bewilderment regarding double jeopardy not only in the State of Missouri, but in every jurisdiction within this country.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

PAUL ROBERT OTTO
Assistant Attorney General

Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

APPENDIX A

IN THE

MISSOURI COURT OF APPEALS

SOUTHERN DISTRICT

Division Two

STATE OF MISSOURI, *Plaintiff-Respondent,* vs. RANDY LEE SINCLAIR, *Defendant-Appellant.*	**No. 11681**

APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI

Honorable John C. Crow, Judge

John Ashcroft
Attorney General

Nancy D. Kelley
Asst. Attorney General
of Jefferson City — for Plaintiff-Respondent

Lawrence A. Smith
of Springfield — for Defendant-Appellant

AFFIRMED IN PART, REVERSED AND VACATED IN PART

BILLINGS, P.J. Defendant Randy Lee Sinclair was convicted of second degree assault [§ 565.060, RSMo 1978] and armed criminal action [§ 571.015, RSMo 1978]. He was

sentenced as a persistent offender [§ 558.016, V.A.M.S.] on the assault conviction to an eight-year prison term. Pursuant to the jury's verdict, the court sentenced him to a thirty-year term for armed criminal action.[1] By reason of Sours v. State, ____ S.W.2d ____ (Mo. banc, August 18, 1980), we are required to reverse and set aside the sentence and judgment for armed criminal action. We affirm the sentence and judgment for assault.

The sufficiency of the evidence to sustain the assault conviction is not questioned. There was substantial evidence from which the jury could find that the defendant stabbed an elderly man several times with a large blade "buck" pocketknife. A short time before the two men alighted from a city bus the defendant told a bus passenger that he had a knife in his boot. Defendant was observed following the elderly man and witnesses saw a knife in his hand as he was striking his victim. Defendant was seen pitching an object from his hand at the scene of the crime and a "buck" knife was found nearby.

A police officer testified defendant had a similar "buck" knife in his possession a few days before the date of the crime. Defendant objected and requested this testimony stricken. The court sustained the objection and instructed the jury to disregard the testimony. Defendant then moved for a mistrial which the court denied.

Defendant contends the testimony of his having a similar knife prior to the time in question "was so prejudicial as to destroy the very basis of [his] case" because he testified he "had no knife with him on the night in

---

1. The trial court ordered the sentence for armed criminal action be served first and that the assault sentence was to run consecutive to the armed criminal action sentence. The court further ordered that both sentences were to run consecutive to another sentence previously entered.

question." We frankly have difficulty in understanding defendant's claim of prejudice and are not enlightened by the argument portion of his brief. His theory, if it be such, is not developed in the argument and we find no authorities cited therein to support his contention. Rather than dismiss the point [State v. Schulten, 529 S.W.2d 432 (Mo. App. 1975)], and assuming for some reason the testimony was objectionable, we, nevertheless, find no abuse of discretion by the trial court in failing to declare a mistrial. State v. Johnson, 504 S.W.2d 23 (Mo. 1973); State v. Petrik, 550 S.W.2d 613 (Mo.App. 1977).

The judgment is affirmed.

William H. Billings
Presiding Judge

HOGAN and MAUS, JJ., concur.

Supreme Court No. 62563

IN THE

SUPREME COURT OF MISSOURI

SOUTHERN DISTRICT No. 11681

SEPTEMBER SESSION 1980

State of Missouri, Respondent,

vs. TRANSFER

Randy Lee Sinclair, Appellant.

Now at this day, on consideration of RESPONDENT'S Application to transfer the above entitled cause from the SOUTHERN DISTRICT Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the SEPTEMBER Session thereof, 1980, and on the 12th day of NOVEMBER, 1980, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 12th day of NOVEMBER, 1980.

Thomas Simon, *Clerk.*

Anne Berhorst, *D.C.*

APPENDIX B

565.060, RSMo 1978: Assault in the second degree.—1. A person commits the crime of assault in the second degree if:

(1) He knowingly causes or attempts to cause physical injury to another person by means of a deadly weapon or dangerous instrument; or

(2) He recklessly causes serious physical injury to another person; or

(3) He attempts to kill or to cause serious physical injury or causes serious physical injury under circumstances that would constitute assault in the first degree under section 565.050, but

(a) Acts under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of the explanation or excuse shall be determined from the viewpoint of an ordinary person in the actor's situation under the circumstances as the actor believes them to be; or

(b) At the time of the act, he believes the circumstances to be such that, if they existed would justify killing or inflicting serious physical injury under the provisions of chapter 563 of this code, but his belief is unreasonable.

2. The defendant shall have the burden of injecting the issues of extreme emotional disturbance under paragraph (a) of subdivision (3) of subsection 1 or belief in circumstances amounting to justification under paragraph (b) of subdivision (3) of subsection 1.

3. Assault in the second degree is a class D felony.

571.015, RSMo 1978: Armed criminal action, defined, penalty.—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection

shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

APPENDIX C

Section 750.529, M.C.L.A., reads as follows:

750.529. Armed robbery; aggravated assault—Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. As amended P.A. 1959, No. 71, § 1, Eff. March 19, 1960.

Michigan Compiled Laws Annotated, 750.227b, reads as follows:

Michigan Compiled Laws Annotated, 750.227b. *Possession at time of commission or attempted commission of felony; additional sentence, punishment—*

"Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony except the violation of section 227 or section 227a[1], is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

"(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the

felony, and shall be served consecutively with the preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

"(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term, imposed pursuant to subsection (1). P.A. 1931, No. 328, § 227b, added to P.A. 1976. No. 6, § 1, Eff. Jan. 1, 1977." [Footnote omitted.]